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No. 80-2026

In the Supreme Court of the United States

October Term, 1980

HOWARD BROWN,
Petitioner,

vs.

THE STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE EIGHTH DISTRICT COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER QUESTIONS OF LAW

1. Due process of law is not violated by testimony relating to an informant's past reliability. Any denial of the ability of a defendant to cross-examine police officers concerning a non-testifying informant's criminal record does not violate due process and, if error at all, was harmless. No substantial constitutional question is raised by the petitioner's question of law.

2. Neither due process nor the integrity of a criminal trial are implicated by a trial court's discretionary exclusion of evidence that was clearly hearsay, incompetent, and inadmissible. No substantial constitutional question is involved herein.

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TO: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

There is no substantial federal question which would require the Court to review this case.

The questions herein presented were raised in the trial court, the Court of Appeals for Cuyahoga County, Ohio, and the Supreme Court of Ohio. The jury in the trial court found the petitioner guilty of drug law violations of the Ohio Revised Code. The Court of Appeals affirmed

the judgment of conviction. The Supreme Court of Ohio dismissed the petitioner's appeal for the reason that no substantial constitutional question existed.

The Ohio courts decided this case in accordance with the statutes and Constitution of the State of Ohio, the Constitution of the United States, and applicable decisions of this court. No substantial federal question is therefore presented by the petition for certiorari.

STATEMENT OF THE CASE

Howard Brown was indicted for violations of the drug law, drug trafficking, Ohio Revised Code, Section 2925.03, and permitting drug abuse, Ohio Revised Code, Section 2925.13, on the 13th day of October, 1978, as those crimes related to an incident occurring on the 31st day of July, 1978. At the time of his arraignment on November 1, 1978, the petitioner entered pleas of not guilty to both counts. A jury trial was commenced on November 19, 1979. On November 23, 1979, the jury returned verdicts of guilty as to both counts. The petitioner was sentenced on February 1, 1980. Appellate bond was given by the trial court over the State's objection. Petitioner also entered a plea of guilty to an unrelated drug case at the time of his sentencing. Petitioner has subsequently been arrested by Cleveland Police Officers and Federal Law Enforcement Agents for separate and distinct violations of both State and Federal law.

The conviction obtained herein was subsequently appealed to the Court of Appeals of Ohio, Eighth District, County of Cuyahoga. On or about the 20th day of November, 1980, the conviction obtained was affirmed by the aforementioned Court of Appeals. On or about the 31st day of March, 1981, the Ohio Supreme Court overruled

petitioner's Motion for Leave to Appeal indicating that no substantial constitutional question existed.

The State's evidence in this case showed that on July 31, 1978, an informant for the East Cleveland Police Department set up a controlled purchase of heroin via a phone call to the petitioner. The transaction was completed by Howard Brown's accomplices, Jerome King and Thomas Bradford.

The State's first presentation of the facts was in a pretrial motion hearing, relating to the attempt to suppress the tape of the phone conversation relating to the drug transaction. Detective Copeland was the only witness presented in that motion hearing and, therefore, his testimony was not rebutted. Detective Copeland indicated that at the time of the hearing he had been employed as a police officer for the City of East Cleveland for nine and one-half years and had been working in the Narcotics Unit for seven years (R. 6). The officer indicated that he had known Howard Brown since 1972 as the result of arrests and numerous conversations with the petitioner (R. 7). Detective Copeland indicated that he had a phone conversation with Howard Brown in January of 1978 and that he had three other phone conversations with the petitioner subsequent to January of 1978 (R. 8, 9). Subsequent to the January phone conversation and as a result of the detective once again calling the Heatwave Bar, Copeland next talked to Brown in April/May, 1978 (R. 9, 10). The next two phone conversations that Copeland had with Brown occurred in July of 1978, with the second one being on the 28th day of July, 1978, a mere few days before the taped conversation in issue (R. 11,12).

Since the end of July, 1978, the detective had several more contacts with Howard Brown, to include arresting

him at the Heatwave in September of 1978; calling Brown at the Heatwave in October of 1978, and again in November of 1978; plus, an hour-long conversation with Brown at the East Cleveland Police Department during this same time frame (R. 13-15).

The taped phone conversation which led to the arrest and conviction of Howard Brown occurred on the 31st day of July, 1978 in the afternoon. Detective Copeland initially indicated the procedures he followed to ensure that the tape recorder and the tape were functioning properly (R. 18, 19). The record clearly demonstrates at page 20 of the transcript that Detective Copeland twice indicated that he had secured the informant's permission to tape the phone call prior to the placing thereof (R. 20). After calling information, the phone number of the Heatwave Bar was obtained and then dialed by the informant, John Wesley Martin, while using a phone located in the East Cleveland Police Department's Detective Bureau (R. 20, 21). Detectives Copeland and D'Agostino then monitored the entirety of the ensuing phone conversation between Martin and Brown (R. 22).

The tape itself was then played in the courtroom. Detective Copeland identified the voices on the tape as being John Wesley Martin and Howard Brown (R. 26). According to Detective Copeland, the tape fairly and accurately reflected the conversation of the two parties involved (R. 27).

Detective Copeland further indicated that the defense attorney for Howard Brown obtained a copy of the recording for the purpose of voice print identification by the defendant's independent analyst (R. 28, 29). It is to be noted that no evidence was presented either in this hearing or at trial which rebutted Detective Copeland's iden-

tification of Howard Brown's voice, even though independent analysis was made by the defendant's expert. No legitimate basis was presented by the petitioner to justify suppression. As a result of such failure on the part of the petitioner, the motion to suppress was overruled by the trial court.

Subsequent to the selection of the jury, Detective Copeland was called as the first State's witness in its case-in-chief. Once again, Detective Copeland recounted his employment and experience as a police officer (R. 75, 76). This officer first came to know the informant about one year prior to the transaction involved herein (R. 79). Martin was more closely associated with Detective D'Agostino as that detective's informant (R. 79). On the 31st day of July, 1978, John Wesley Martin arrived at the East Cleveland Police Department in the area of 4:30 p.m., where he had conversation with both Copeland and D'Agostino (R. 83). Consistently with his testimony in the motion hearing, Detective Copeland indicated the procedures he followed to ensure the proper functioning of the tape recorder and tape to be used for purposes of recording the conversation that ensued, wherein Martin arranged to buy drugs from Howard Brown (R. 83). After observing Martin dial the number for the Heatwave Bar, Detective Copeland monitored the phone conversation (R. 85). Once again, Detective Copeland identified the tape used, the voices thereon, and a typed transcript (State's Exhibit #2) of that recorded phone conversation (R. 88, 90, 94). Detective Copeland, for the jury's benefit, recounted the numerous times since 1972 that he had talked to Howard Brown, either in person or over the phone (R. 91, 92). As of the time that trial commenced in this case, Detective Copeland indicated that he had heard Brown's voice between fifteen and twenty times (R. 93).

The gist of the phone conversation in which the person called announced himself to be "Howard", was that Martin would buy drugs for $140 and that the seller (Howard Brown) would be sending his accomplices in a green Volkswagen in order to complete the transaction (See State's Exhibit #2).

After the phone call, which was monitored by Copeland and D'Agostino, Martin was strip searched and given the appropriate funds in order to complete the transaction (R. 95, 97). The informant was then transported in an unmarked police car to the area of Hatton's Bar in East Cleveland (R. 101). Shortly after Martin exited the police car, he was picked up by two males, subsequently identified as King and Bradford, who were in the green Volkswagen that had been mentioned in the phone conversation (R. 101). Detective D'Agostino, who was the passenger in the police car, began to take photographs of the transaction and of the parties involved (R. 103, 201).

With Martin now in the green car, that car left the Windemere Rapid parking lot and was followed by the police as the VW proceeded in an easterly direction on Euclid Avenue in the City of East Cleveland, County of Cuyahoga, and State of Ohio (R. 107, 108). After traveling about four blocks, Martin exited the green car and returned to the police car (R. 109). King parked his car in front of Two-Jack's Bar. King and Bradford exited the vehicle and were photographed by D'Agostino (R. 111, 201). From the time that Martin left the police car to the time that he returned, he was never out of sight of the two detectives (R. 111).

When Martin returned to the police car, he handed Copeland a clear plastic bag containing a brown powdery substance which he could only have obtained while in the green Volkswagen (R. 118). Thus, the transaction initiated

via the phone conversation with Howard Brown, whom Detective Copeland knew as an owner of the Heatwave Bar (R. 116), was completed in accordance with the instructions given to Martin by Brown over the phone.

Martin, Copeland and D'Agostino, returned to the East Cleveland Police Department. Once again a strip search of Martin was conducted by Copeland and D'Agostino (R. 120, 204). As with the strip search conducted prior to their leaving the East Cleveland Police Department, no drugs or money were found on John Martin (R. 95, 120, 204).

During the course of Detective Copeland's testimony, in an improper fashion, and without ever establishing the veracity thereof, the defense attorney recounted that which he purported to be the informant's prior record in the presence of the jury.

The packet that Martin turned over to Copeland was subsequently transported to the Ohio Bureau of Criminal Identification and Investigation at Richfield, Ohio, where the substance was tested by Michael Gingo of that State agency (R. 169, 171). By way of the chemical analysis conducted, Mr. Gingo determined that the substance obtained by Martin weighed 2.4 grams and contained the presence of heroin, a Schedule I drug (R. 171, 175, 177).

The petitioner presented several witnesses in his own behalf to include attorney, Raymond J. Grabow. Apparently, and prior to the testimony of any other witness, the petitioner sought to introduce a hearsay statement which was never properly qualified through Grabow. That statement was never introduced into evidence nor does the record reveal that it was ever proffered for purposes of the record. The petitioner, through his attorney, Thomas Jacobs, called both co-defendants to the witness stand. In

an unseemly display, Mr. Jacobs called Bradford and King knowing full well that they would assert their rights under the Fifth Amendment. Mr. Jacobs went so far as to indicate with respect to King that "I'll let him take the Fifth Amendment" (R. 264), and still proceeded to call King and Bradford as witnesses.

None of the witnesses presented on behalf of the petitioner rebutted any of the State's evidence.

REASONS FOR DENYING THE WRIT

1. Due process of law is not violated by testimony relating to an informant's past reliability. Any denial of the ability of a defendant to cross-examine police officers concerning a non-testifying informant's criminal record does not violate due process and, if error at all, was harmless. No substantial constitutional question is raised by the petitioner's question of law.

The police officers obviously testified that Martin was an informant, reliable to them. The jury had the right to believe or disbelieve that, assuming its relevancy. Clearly, through a series of wholly improper questions, defense counsel divulged what he purported to be the prior record of the informant. However, the petitioner failed to offer or proffer any evidence tending to establish whether or not the informant did have a prior record. The police officers did not render any expert opinions as to the informant's good citizenship.

The complained of testimony herein was irrelevant to the proof of the fact of the commission of the crimes involved. The police thoroughly monitored and surveilled the entire transaction set in motion by the informant and the petitioner. The informant's past activities were irrele-

vant to the proof of the State's case. If there was any error at all, such error was harmless. *Harrington v. California* (1969), 395 U.S. 250; *Chapman v. California* (1967), 386 U.S. 18.

The petitioner raised no substantial constitutional question herein and offers no law in support of the proposition.

2. Neither due process nor the integrity of a criminal trial are implicated by a trial court's discretionary exclusion of evidence that was clearly hearsay, incompetent, and inadmissible. No substantial constitutional question is involved herein.

Petitioner in his brief indicates that the petitioner interposed some defense at trial. The record does not support such an assertion. No defense was ever presented by way of competent evidence in this matter. The Bradford affidavit was never properly qualified, was not introduced into the evidence, and was not proffered for the record. One can only assume that the sham defense cannot be considered by this Honorable Supreme Court, since the hearsay statements were incompetent evidence and not part of the record of this matter.

Clearly, the petitioner was trying, through Attorney Grabow, to do indirectly that which he could not do directly. The failure to even proffer the affidavit gives rise to the inference of its concocted nature and gross incompetence as evidence.

Petitioner in this brief cites with relish the new Rules of Evidence, but failed to turn the Appellate Court's attention to the provisions of Ohio Evidence Rule 804(B)(3), even though he now turns this Court's attention to the rule which states:

"Statement against interest.

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, *is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.*" (Emphasis added.)

Clearly, and even though this case was tried long before the new Ohio Rules of Evidence came into effect, even if the Rules had been in effect, no evidence was offered or proffered to show any corroborating circumstances indicating the trustworthiness of the Bradford affidavit.

The trial court, in the sound exercise of its discretion, properly found the evidence to be incompetent, and, therefore, of no value to the jury in its search for the truth.

The record does not show the applicability of any exception to the hearsay rule. At trial, it was incumbent upon the petitioner, as the proponent of such hearsay, to demonstrate some exception in order to gain admission of the declaration. The petitioner failed to so demonstrate any grounds for admission.

A case interpreting the equivalent Federal Rule, 804 (b) (3) is *Lowery v. State of Maryland* (1975), 401 F. Supp. 604. In *Lowery,* an affidavit of a co-defendant who had testified for the prosecution, and thereby aided in the conviction of David Lowery, subsequently—three years after the trial—came into the possession of the defendant—

Lowery. The affidavit was declared to be inadmissible since it lacked sufficiently reliable corroborating circumstances. *Lowery* is analogous to this matter since the affidavit was not spontaneous in that it was manufactured on or about the 25th day of April, 1979, nearly a year after the time of the crime, i.e., the 31st day of July, 1978.

The sham nature of the affidavit was clearly apparent to the court upon its reading thereof. The "Bradford affidavit" falls by its own terms since it speaks of some alleged scam worked out by Martin and Bradford occurring as the affiant states "sometime in August of 1978". Clearly, the alleged scam occurred after the date of the crime herein, assuming arguendo any scam at all.

Further, it is not necessarily true that Bradford was unavailable as a witness. Clearly, Bradford had waived whatever Fifth Amendment rights he may have had by the admission to a third party, not his attorney of record, of the alleged commission of some other crime involving a scam of the East Cleveland Police Department. As such, it may be argued that such alleged admission conceivably precluded him from asserting any Fifth Amendment rights. See *Couch v. United States* (1973), 409 U.S. 322, 93 S. Ct. 611, 34 L. Ed. 2d 548.

Regardless of the status of Bradford's Fifth Amendment privilege, it is clear that the "corroboration requirement" is to "be construed in such a manner as to effectuate its purpose of circumventing fabrication." Advisory committee notes printed in 28 U.S.C.S. App. 547. The delay in obtaining the affidavit and the fact that the affidavit refers to a time period subsequent to the commission of the crime herein demonstrates the fictional nature thereof and its basic incompetence as evidence to aid a jury in the search for the truth. The spontaneity requirement was

alluded to in *Chambers v. Mississippi* (1973), 410 U.S. 284, 300, 93 S. Ct. 1038, 35 L. Ed. 2d 297, a case which the petitioner cites in support of his position.

This question of law is without merit since no substantial constitutional question is raised hereby.

CONCLUSION

We respectfully urge that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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